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FROM Diane Threlkett OFFICE/DESK 25D-423 PHONE NBR 697-1305  
SUBJECT Justice report on S. 2366

PAGES 4

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**REQUEST/RECEIPT FOR TRANSMISSION**

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EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

*FAX*  
**SPECIAL**

June 8, 1988

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer-

\* Central Intelligence Agency  
\* Department of Defense - Brick - 697-1305 (06)

SUBJECT: Justice draft report on S. 2366, "Intelligence Authorization Act."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than MONDAY, JUNE 13, 1988.

Questions should be referred to Annette Rooney/Sue Thau (395-7300) the legislative analyst in this office.

*Ronald K. Peterson*

RONALD K. PETERSON FOR  
Assistant Director for  
Legislative Reference

Enclosures

cc: A. B. Culvahouse, Jr.  
A. Raul  
G. Jones  
A. Donahue  
D. Gessaman

*DUE: MONDAY*

**SPECIAL**

*Diane - please  
fax to CIA  
upon receipt.  
Thanks!*

U.S. Department of Justice



## Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Sam Nunn  
Chairman  
Committee on Armed Services  
U.S. Senate  
Washington, D.C. 20510-6050

Dear Mr. Chairman:

This letter presents the views of the Department of Justice with respect to the constitutional issues raised by S. 2366, the "Intelligence Authorization Act, Fiscal Year 1989." We are concerned that the bill as currently drafted poses constitutional problems.

The proposed legislation contains extensive reporting requirements with respect to the Inspector General of the Central Intelligence Agency. Section 504 would require the Director of Central Intelligence to report to specified committees of Congress "any . . . decision made by the Director . . . which would substantially affect the ability of the Inspector General to carry out his duties and responsibilities," and further to report "the position of the Inspector General with respect to such decision . . . ." The Director must submit semiannual reports to Congress summarizing, among other things, "the status of corrective actions taken during the reporting period in response to Inspector General recommendations." The Director must also report on any decision "to prohibit the Inspector General from initiating, carrying out, or completing any audit, inspection, or investigation within the Central Intelligence Agency . . . ."

These requirements, in particular the disclosure of Inspector General recommendations and of potentially opposing views within the executive branch, impermissibly interfere with the President's control over the deliberative processes of the executive branch. Accordingly, these requirements run counter to the President's authority as head of the unitary executive branch to "take Care that the laws be faithfully executed," U.S. Const., art. II, sec. 3, and to coordinate and supervise his subordinates. See generally Myers v. United States, 272 U.S. 52, at

163-164 (1926); Congress Construction Corp. v. United States, 314 F.2d 827, 830-831 (Ct. Cl. 1963).

Were the bill to be presented to the President with these provisions in their present form, we would recommend a veto.

In addition, one section of the bill is very unclear and may pose interpretive problems as well.

Proposed section 421(b) of Title 10 provides as follows:

(b) The Secretary of Defense may use funds other than appropriated funds to pay for the expenses of arrangements with foreign countries for cryptologic support without regard to the provisions of law relating to the use of the United States Government funds, except that --

(1) no such funds may be used, in whole or in part, by or for the benefit of the Department of Defense for a purpose for which Congress had previously denied funds;

(2) proceeds from the sale of cryptologic items may only be used to purchase replacement items similar to the items that are sold; and

(3) the authority provided by this subsection may not be used to acquire items or services for the exclusive benefit of the United States.

We would interpret the phrase "a purpose for which Congress had previously denied funds" to refer only to affirmative prohibitions on spending enacted by Congress. A broader interpretation of the act of "den[ying] funds" -- to include appropriation proposals that are never acted upon by committees, provisions of bills that are dropped in conference, floor amendments that are voted down, or many other similar events -- could violate the Constitution. INS v. Chadha, 462 U.S. 919, 952 (1983) (congressional actions which are an exercise of legislative power are subject to bicameralism and presentment requirements of Constitution). Thus, the phrase may not be interpreted to mean, for example, that one house of Congress may prohibit expenditure under this section by disapproving of funding for that purpose at some point after enactment of the bill.

Of course, if the phrase is meant to be purely descriptive and thus capable of definition as of the date of the enactment of the bill, Congress could craft a broader definition of "den[ying] funds" while avoiding the constitutional problem. As a practical matter, however, the phrase as currently drafted is insufficiently specific to enable the Executive to determine what the limits of any such broader construction might be.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Thomas M. Doyd  
Acting Assistant Attorney General